A

Public Prosecutor v Marjan bin Nasir @ Juhadi

B

HIGH COURT (KOTA KINABALU) — CRIMINAL CASE NO BKI-45B-4/9 OF 2014
RAVINTHRAN J
11 MAY 2015

C

Criminal Procedure — Sentencing — Appropriate sentence — Accused charged with offence under s 304(a) of the Penal Code — Accused pleaded guilty and convicted — Whether plea of guilty and being first offender qualified as mitigating factors for accused — Whether reaction of accused in responding to provocation proportionate — Whether detention order at Henry Gurney School appropriate — Penal Code s 304(a)

D

The accused was originally charged with the offence of murder, nevertheless, an alternative charge under s 304(a) of the Penal Code was offered to the accused. The accused pleaded guilty to the alternative charge and was convicted. The present case was the court's decision on the sentence to be passed to the accused based on the conviction. The accused urged the court not send him to prison but to order him to be sent to the Henry Gurney School until he attained the age of 21 years. The accused submitted that he was a first offender and that he had pleaded guilty promptly once the alternative reduced charge was offered to him. Further, the accused killed the deceased under extenuating circumstances which justified a lenient punishment. The prosecution submitted that a custodial sentence was more appropriate as the accused had committed the serious crime of taking the life of a fellow human being. The prosecution further submitted that, at the time of the decision, the accused was 19 and half years old which means that he would only be detained at the Henry Gurney School for about one and a half years.

E

F

G

Held, sentencing the accused to seven years imprisonment:

H

(1) The court had given sufficient consideration to the plea of guilty of the accused that was entered at the earliest opportunity and the fact that he was first offender. However, in very serious cases, a plea of guilty and being a first offender cannot necessarily qualify as a significant mitigating factor to save an accused from going to prison. The accused was provoked but the reaction of the accused in responding by stabbing the deceased with a lethal weapon three times in the vulnerable parts of human body was clearly disproportionate to the provocation (see para 7).

I

(2) A detention order at the Henry Gurney School was not appropriate for the accused because: firstly, one and a half years of detention was

insufficient to rehabilitate the accused; secondly, the punishment was too light compared to the enormity of the offence; and thirdly, it would send the wrong message to the public that killing a fellow human being would attract a very light punishment on account of being young, being provoked and being drunk. The court had to show abhorrence of violent crimes such as the one committed by the accused in this case. The maximum punishment for the crime in question was 30 years, nevertheless, the court was of the view that a lengthy period of incarceration in the prison would not assist in the reformation of the young accused (see para 7).

[Bahasa Malaysia summary

Tertuduh pada asalnya dituduh dengan kesalahan membunuh, walau bagaimanapun, tuduhan alternatif di bawah s 304(a) Kanun Keseksaan ditawarkan kepada tertuduh. Tertuduh mengaku bersalah kepada tuduhan alternatif dan disabitkan. Kes ini adalah keputusan mahkamah atas hukuman yang akan dikenakan kepada tertuduh berdasarkan sabitan. Tertuduh mendesak mahkamah untuk tidak menghantarnya ke penjara tetapi untuk memerintah untuk dirinya dihantar ke Sekolah Henry Gurney sehingga dia mencapai umur 21 tahun. Tertuduh berhujah bahawa dia adalah pesalah pertama dan bahawa dia telah mengaku bersalah serta merta sebaik sahaja tuduhan alternatif yang dikurangkan ditawarkan kepadanya. Selanjutnya, tertuduh membunuh si mati di bawah keadaan meringankan yang menjustifikasikan hukuman yang lebih ringan. Pihak pendakwaan berhujah bahawa hukum jagaan adalah lebih wajar kerana tertuduh telah melakukan jenayah serius dengan mengambil nyawa sesama manusia. Pihak pendakwaan selanjutnya berhujah bahawa, pada masa keputusan, tertuduh adalah 19 setengah tahun yang bermaksud bahawa dia hanya boleh ditahan di Sekolah Henry Gurney lebih kurang satu setengah tahun.

Diputuskan, menghukum tertuduh tujuh tahun penjara:

(1) Mahkamah telah memberikan pertimbangan yang mencukupi kepada pengakuan bersalah tertuduh yang dimasukkan pada peluang terawal sekali and fakta bahawa dia adalah pesalah pertama. Walau bagaimanapun, dalam setiap kes-kes serius, pengakuan bersalah dan sebagai pesalah pertama tidak mungkin layak sebagai faktor pengurangan yang bermakna untuk menyelamatkan tertuduh daripada masuk penjara. Tertuduh dikacau tetapi reaksi tertuduh dalam membalas dengan menikam si mati dengan senjata yang tajam sebanyak tiga kali di bahagian terdedah badan manusia jelas tidak seimbang kepada provokasi (lihat perenggan 7).

(2) Perintah penahanan di Sekolah Henry Gurney adalah tidak wajar bagi tertuduh kerana: pertama, penahanan satu setengah tahun tidak mencukupi untuk memulihkan tertuduh; keduanya, hukuman adalah

terlalu ringan dibandingkan dengan kejamnya kesalahan; dan ketiga, ia akan memberikan kenyataan salah kepada awam bahawa membunuh sesama manusia akan dikenakan dengan hukuman ringan atas sebab muda, dikacau dan mabuk. Mahkamah perlu menunjukkan kebencian terhadap jenayah kejam seperti yang dilakukan oleh tertuduh dalam kes ini. Hukuman maksima bagi jenayah yang dipersoalkan adalah 30 tahun, walau bagaimanapun, mahkamah berpendapat bahawa tempoh panjang pemenjaraan di dalam penjara tidak akan membantu dalam perubahan perangai tertuduh muda (lihat perenggan 7).]

Notes

For cases on appropriate sentence, see 5(3) *Mallal's Digest* (5th Ed, 2015) paras 4110–4112.

Cases referred to

Azwel bin Mohd Ali lwn Pendakwa Raya [2013] 1 MLJ 253; [2012] 6 CLJ 809, CA (refd)
Pendakwa Raya v Sangkar a/l Ratnam [2007] 7 MLJ 353, HC (refd)
Pendakwa Raya v Soo Tai Leng [2005] 7 MLJ 363; [2005] 7 CLJ 218, HC (refd)
PP v Francis anak Kuin [2006] MLJU 109; [2006] 6 CLJ 103, HC (refd)
PP v Nasarudin bin Ahmad & Ors [1993] 2 MLJ 9, HC (refd)
PP v Wong Wei Choon [2007] 8 MLJ 301; [2007] 8 CLJ 536, HC (refd)
Reg v JH Sargeant [1975] 60 Cr App R 74, CA (refd)

Legislation referred to

Child Act 2001 s 76
Penal Code s 304(a)

Luke Ressa Balang (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecutor.
Rizwandean Borhan (Yusri & Rizwan Advocates & Solicitors) for the accused.

Ravinthran J:

INTRODUCTION

[1] The accused was originally charged with the offence of murder. He was then only 17 years five months old. After seven witnesses were called to testify, the prosecution offered a reduced alternative charge under s 304(a) of the Penal Code. He pleaded guilty to the alternative charge and was convicted. I deferred sentencing pending the preparation of a probation report by the welfare officer.

A BACKGROUND FACTS

[2] The alternative charge against the accused read as follows:

> Bahawa kamu, pada 02hb Mei 2013, jam lebih kurang 4.36 a.m bertempat di rumah No 13, Lorong Sembulan 13, Kg. Sembulan, di dalam Daerah Kota Kinabalu, di dalam Negeri Sabah, telah menyebabkan kematian penama Emon Gederoh (Lelaki) 19 tahun (SB592708), dengan niat menyebabkan kematiannya dan dengan itu kamu telah melakukan Homisid salah yang tidak terjumlah kepada kesalahan membunuh yang boleh dihukum dibawah Sesyen 304(a) Kanun Keseksaan.

[3] The evidence that was led by the prosecution its witnesses and the brief facts can be summarised as follows. The accused, the deceased and two other victims worked at Restoran Kak Nong in Kota Kinabalu. Some of the restaurant workers, including the accused and the deceased lived at No 13, Lorong Sembulan 13, Kampung Sembulan. It apparently served as the workers' quarters. On the evening of 1 May 2013 which was a public holiday, the residents of the said house gathered to drink a strong local alcoholic beverage known as 'montoku' and to gamble. A serious altercation developed between the accused and the deceased during this drinking session. The deceased thought that the accused was making too much noise and remonstrated against his conduct. However, he did not stop there as he went further and punched the accused in the face. The accused lost a tooth and bled from the nose as a result. The other co-workers managed to break up the scuffle between the accused and the deceased. The supervisor of the restaurant also lived in the same house. He advised the accused and the deceased not to fight. He then brought the accused to his room upstairs and left him there. It was then about 8.30pm. However, the bad blood between the accused and the deceased did not cease. Later at about 10pm, the deceased and other workers continued drinking alcohol in the room of the accused until the wee hours of the following morning. When the drinking session ended, everyone left the room of the accused. However, the accused re-entered the room of the accused and punched him again. The accused retaliated by stabbing the deceased with a knife several times. Two other co-workers who attempted to restrain the accused were also stabbed and suffered grievous wounds. However, the accused was not prosecuted for causing injury to them. The accused was only restrained when the supervisor of the workers came out of his room upon hearing the commotion. The autopsy carried out by the pathologist revealed that the deceased had been stabbed three times, ie on the neck, chest and stomach. The pathologist said that the chest wound was fatal as it injured the left lung and the heart causing bleeding which result in the hypovolaemic shock and death.

SUBMISSION BY COUNSEL FOR THE ACCUSED

[4] Counsel for accused gave some insight to the background of the accused. The accused is from the interior rural district of Ranau. He was poorly educated. He performed various menial jobs in Ranau since leaving school after Form One. His parents are rubber tappers who earn only RM400 to RM500 a month. He came to work in Restoran Kak Nong in Kota Kinabalu only in March of 2013. He earned a salary of RM850 a month. Counsel added that the accused is a filial son who had always sent some money home.

[5] In respect of the mitigating factors, counsel for the accused said that the accused is first offender and that he pleaded guilty promptly once the alternative reduced charge was offered to him. Counsel for the accused submitted that the accused killed the deceased under extenuating circumstances which justify a lenient punishment. He referred to the brief facts adduced by the prosecution and submitted that the accused was provoked by the deceased. He said the accused was punched again later in his room by the deceased. The force of the punch had caused the accused to lose a tooth and suffer nose-bleed. He also said that the deceased was older and bigger than the deceased. He urged the court not to send the accused to prison but to order him to be sent to the Henry Gurney School until he attains the age of 21 years. He submitted a number of authorities to support his submission. Most of these authorities are in respect young offenders who committed the offence of culpable homicide not amounting to murder under s 304(a) of the Penal Code. I shall refer to some the cases below. In *Public Prosecutor v Francis anak Kuin* [2006] MLJU 109; [2006] 6 CLJ 103, the accused was 17 years and six months old at the time of commission of offence. In that case as well, the accused, the victim and some others were drinking alcohol during the incident in question. The accused hit the victim with a piece of wood and caused his death. The punishment imposed on the accused was detention in the Henry Gurney School under s 76 of the Child Act 2001 ('the Act') until he attains the age of 21 years. The second case cited by counsel for the accused is *Public Prosecutor v Wong Wei Choon* [2007] 8 MLJ 301; [2007] 8 CLJ 536. In that case, the accused was 17 years and six months old. He was punished with seven years imprisonment. The court noted that although no dangerous weapons were used, the reaction of the accused was disproportionate in the circumstances of the case. In *Pendakwa Raya v Sangkar a/l Ratnam* [2007] 7 MLJ 353, the accused was 17 years old. He had attacked and killed a defenceless 77 year old man who had derided him by using abusive language and insults. The court considered the provocation given by the victim as a mitigating factor. Nonetheless, the court imposed an imprisonment sentence of 11 years. In *Public Prosecutor v Nasarudin bin Ahmad & Ors* [1993] 2 MLJ 9, the third accused was 17 years old at the time of the commission of the offence under s 304(a) of the Penal Code. The offence was committed in the

commission of a robbery. However, the court noted that the ringleader was the second accused who was already 27 years old. The court sentenced the young offender to only five years imprisonment. In *Pendakwa Raya v Soo Tai Leng* [2005] 7 MLJ 363; [2005] 7 CLJ 218, the accused was not a young offender. The accused had caused the death of her ex-husband during a quarrel. She was sentenced to eight years imprisonment. In conclusion, counsel for the accused urged the court not imprison the accused but order him to be detained at the Henry Gurney School under s 76 of the Act until he reaches the age of 21 years.

SUBMISSION BY THE PROSECUTION

[6] The learned DPP submitted that a custodial sentence is more appropriate in this case as the accused had committed the serious crime of taking the life of a fellow human being. He pointed out that the accused is now about 19 and half years old which means that he would only be detained at the Henry Gurney School for about one and a half years. He cited the Court of Appeal case of *Azwel bin Mohd Ali lwn Pendakwa Raya* [2013] 1 MLJ 253; [2012] 6 CLJ 809 in support. In that case, the 17 year old appellant had stabbed the deceased to the death with a pair of scissors in drunken rage after a stone thrown by the deceased hit him. When the murder charge was amended to culpable homicide not amounting to murder under s 304(a) of the Penal Code, the appellant pleaded guilty. The High Court sentenced the accused to ten years' imprisonment. The Court of Appeal dismissed the appeal and said that a deterrent sentence is called for. The Court of Appeal also noted that as the appellant was 19 years and six months old, one year and six months at the Henry Gurney School is insufficient to rehabilitate him. The learned DPP also referred to *Pendakwa Raya v Sangkar a/l Ratnam* [2007] 7 MLJ 353 which was cited counsel for the accused. He submitted that although provocation had been taken into account as a mitigating factor, the court in the said case nonetheless sentenced the accused to 11 years' imprisonment.

DECISION

[7] I am grateful to counsel for the accused and the DPP for having taken the trouble to cite the above cases and some other cases that I did not refer to in this judgment to assist the court in determining the appropriate sentence. The learned DPP has not quarreled with the general principles of sentencing that can be expressed in following words: retribution, deterrence, prevention and rehabilitation (see *Reg v JH Sargeant* [1975] 60 Cr App R 74). The emphasis given by the courts to the above principles have varied from case to case. In cases which involved premeditated acts of violence and cruelty the courts have not flinched from the applying the principle of retribution. In other cases, the courts have given more emphasis to the principle of prevention and rehabilitation. In cases involving young offenders, the courts have always considered the reformative or rehabilitative aim of punishment. In the instant

case, there is no suggestion that the crime in question was premeditated. According to the brief facts tendered by the prosecution, the accused attacked the deceased after being provoked. The accused was only 17 years and five months old at the time of the incident. He is now almost 19 years and six months old. I have given sufficient consideration to the plea of guilty of the accused that was entered at the earliest opportunity and the fact that he is first offender. However, in very serious cases, a plea of guilty and being a first offender cannot necessarily qualify as a significant mitigating factor to save an accused from going to prison. In the instant case, the accused was provoked by the deceased who was bigger built and older. The accused had been punched twice by the deceased. The accused, the deceased and the other coworkers were presumably intoxicated at the material time. I agree that all these are mitigating factors. However, the reaction of the accused in responding by stabbing the deceased with a lethal weapon such as a knife three times in the vulnerable parts of the human body such as the neck and chest was clearly disproportionate to the provocation that was given to him. The accused had also lashed out and stabbed two of his co-workers who attempted to stop him. They suffered grievous injuries as well. I have carefully considered whether a detention order at the Henry Gurney School is appropriate punishment for the accused. In my view, it is not. Firstly, as observed in *Azwel bin Mohd Ali lwn Pendakwa Raya* [2013] 1 MLJ 253; [2012] 6 CLJ 809, one and a half years of detention is insufficient to rehabilitate the accused. Secondly, the punishment is too light compared to the enormity of the offence. The violent act of the accused had prematurely snatched the life of the deceased who was only 19 years old. Thirdly, it would send the wrong message to the public that killing a fellow human being would attract a very light punishment on account of being young, being provoked and being drunk. The courts have also to show abhorrence of violent crimes such as the one committed by the accused in this case. Thus one and a half years detention order in the Henry Gurney School from today might have the unfortunate effect of trivialising the crime committed by the accused. The maximum punishment for the crime in question is thirty years imprisonment. However, I am also of the view that a lengthy period of incarceration in the prison will not assist in the reformation of the young accused. After giving sufficient consideration for the age of the accused and circumstances under which the crime was committed, I sentence him to seven years' imprisonment from the date of arrest.

Accused sentenced to seven years imprisonment.

Reported by Dzulqarnain Ab Fatar